IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(July 6, 1992)

BEFORE BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

APPENDIX A

App. 3a

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

_____

UNITED STATES CIRCUIT JUDGE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(July 6, 1992)

BEFORE BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

Costs are taxed against plaintiff-appellant.

Entered: July 6, 1992
For the Court: Miguel J. Cortez, Clerk

By:
Deputy Clerk

ISSUED AS MANDATE:

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5741

IN RE: HOLYWELL CORPORATION, Debtor.

THEODORE B. GOULD, Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of Appellant, for ( ) stay (xx) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate

shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____, for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

App 11a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust.

Appellee

IN RE: HOLYWELL CORPORATION et al.

Debtors

ORDER

THIS CAUSE comes before the Court upon Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, for

an Order confirming the Bankruptcy Court's Order Finding Theodore B. Gould in Contempt, dated August 1, 1989.

On August 1, 1989, the United States Bankruptcy Court for the Southern District of Florida found Theodore B. Gould in contempt of court if he failed and refused to deliver over certain monies as ordered by August 4, 1989. See Order Finding Theodore B. Gould in Contempt, August 1, 1989, Case No. 84-01590-BRK-SMW, 84-01591-BKC-SMW, 84-01592-BKC-SMW, 84-01593-BKC-SMW, 84-01594-BKC-SMW, para. 8. On Aug. 14, 1989, the United States Bankruptcy Court certified to this Court that Theodore Gould was in contempt for his failure to comply with the Order of August 1, 1989. Such certification was issued as provided in Rule 9020, Rules of Bankruptcy Procedure, and directed that

Mr. Gould be punished as provided in the Order of August 1, 1989.

This Court conducted a hearing on December 14, 1990, concerning whether Mr. Gould was in contempt of Court for the reasons set forth in the decisions of the bankruptcy court. The relevant facts are as follows:

In October 1981, Theodore B. Gould purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became the property of his estate pursuant to 11 U.S.C. § 541(a). Thereafter, and pursuant to the terms of the confirmed bankruptcy plan of reorganization, the concrete pumps and related equipment became the property of the Miami Center Liquidating Trust. See Order Finding Theodore B. Gould in Contempt at 1-2. In

1989, Mr. Gould was contacted by Mr. Lawrence G. McMillan who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, Mr. Gould was notified that the Liquidating Trustee claimed the right to receive the sale proceeds. Mr. Gould refused to allow the sale proceeds to be paid to the Liquidating Trustee, insisting that the contract for the sale of the concrete pumps and related equipment be made in his name alone, and that payment be paid to him. Id. By agreement dated June 2, 1989, Mr. Gould contracted to sell the pumps and equipment to Mr. McMillan for $67,500. The funds were paid to Mr. Gould, without the consent of the Liquidating Trustee. Id.

Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould in Contempt, Mr. Gould was required to turn

over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt in that Mr. Gould's failure to comply with the courts' orders was done in the presence of the court, and that Gould announced his intention not to comply. Funds from the sale are presently held by Mr. Gould in his name at a brokerage firm and have been invested in short-term commercial paper, according to Mr. Gould. He refuses to reveal the brokerage firm and refuses to turn the money over to the Trustee. He has

stated he will not obey any order of the bankruptcy court to do so. Id.

In Mr. Gould's Reply to the Liquidating Trustee's Response to Objections to Certification of Contempt, he contends that (1) the bankruptcy court lacks post-confirmation jurisdiction over Mr. Gould; (2) the Liquidating Trustee was illegally appointed and therefore had no right to pursue this matter; (3) Mr. Gould is not required to turn over the proceeds from the sale of the concrete pumps because the Miami Center Liquidating Trust has evaded its tax obligations; and (4) the concrete pumps were not an asset of the Miami Center Liquidating Trust.

We address each of Mr. Gould's arguments in turn. First, the bankruptcy court does not lack post-confirmation jurisdiction over him. Article XIV of the confirmed plan of reorganization explicitly

provides that the bankruptcy court retains jurisdiction over Mr. Gould and his co-debtors in order to enter any order necessary or appropriate to enforce the plan.[1] The reorganization plan is confirmed and is the law of this case. See

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[1]Article XIV, Retention of Jurisdiction, states specifically:

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;
(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contigent or unliquidated claims;
(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;
(d) to allow or disallow any claim; and
(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII thereof.

Holywell Corp. v. Bank of New York, 59 Bankr. 340 (S.D.Fla. 1986), dismissed sub nom, Miami Center Liquidating Trust v. Bank of New York, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S. Ct. 69, 102 L.Ed. 2d 46 (1988). The plan is binding on Mr. Gould, pursuant to 11 U.S.C. § 1142.

Next, Mr. Gould argues that the concrete pumps are not assets of the Miami Center Liquidating Trust because they were not specially itemized as trust assets by the confirmed plan and thus reverted to him upon the confirmation of the plan. However, the reorganization plan as confirmed states clearly and unambiguously that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code,[2]

[2] 11 U.S.C. Section 541(a) (1) includes as estate assets: "Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the

[Footnote continued on next page]

are assets of the Miami Center Liquidating Trust. See Article V of the plan.[3] The concrete pumps are Section 541(a) assets and the plan's provisions are binding. See 11 U.S.C. § 1142.

[Footnote continued from previous page] debtor in property as of the commencement of the case."

[3] Article V, Creation of Trust, states:

(1) A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court ... is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors ... to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust.

(2) On the Effective Date, all right, title, and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, subject however, to all existing liens, mortgages, security interests and encumbrances.

Third, Mr. Gould claims that the Liquidating Trustee cannot pursue this matter because the Trustee was appointed illegally in derogation of the Bankruptcy Code. Article V of the plan, however, provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan.[4] Mr. Gould's attempt to appeal the plan was not successful. See Holywell v. Bank of New York, 59 Bankr. 340. The Liquidating Trustee was appointed by order dated August 12, 1985; that order was not appealed by Mr. Gould or anyone else.

Finally, Mr. Gould asserts that he need not turn over the concrete pumps sale proceeds because the Miami Center Liquidating Trust refuses to pay certain income taxes. The question of whether the Trust must pay taxes is not relevant to the

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[4] See note 3, supra.

issue of ownership of the concrete pumps. Moreover, the Eleventh Circuit Court of Appeals has determined that the Trust does not have the tax obligations Mr. Could seeks to impose. See In re Holywell, 911 F.2d 5071 (11th Cir. 1990).

In sum, none of the grounds argued by Mr. Gould demonstrate that he should not be certified to be in contempt. We have conducted a de novo review of the record in this case, as required under Bankruptcy Rule 9033(d). After so doing, we accept the findings of fact and conclusions of law of the Bankruptcy Court. Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order.

The only remaining question is whether Mr. Gould's actions amount to civil or criminal contempt or both. The Bankruptcy

Court stated that it was finding Mr. Gould in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure. Rule 9020 governs criminal contempt proceedings and indeed, in its order finding contempt, the Bankruptcy Court applied Rule 9020 because when ordered to comply by the Bankruptcy Court on July 27, 1989, Mr. Gould announced in the presence of that court his intention not to do so.[5]

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[5] Rule 9020 is entitled "Criminal Contempt Proceedings" and provides as follows:

(a) **Contempt committed in presence of bankruptcy judge**

Contempt committed in the presence of a bankruptcy judge may be determined summarily by the bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) **Other contempt**

Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivison

[Footnote continued on next page]

However, the nature of the bankruptcy court Order--imposition of a $1000/day fine until such time as Mr. Gould complies--is more

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[Footnote continued from previous page]

(a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state a time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) **Service and effective date of order; review**

The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day

[Footnote continued on next page]

characteristic of a civil contempt finding.

The Supreme Court has said that the words used by the lower court to describe the contempt are not determinative. Shillitani v. United States, 384 U.S. 364, 369, 86 S. Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). The same actions by a party can amount to both civil and criminal contempt. United States v. United Mine Workers, 330 U.S. 258, 299, 67 S. Ct. 677, 698-99, 91 L.Ed. 884 (1947). It is the nature and purpose of the punishment that is determinative. Id. at 297, n.64 (citations omitted), Hicks v. Feiock, 108 S. Ct. 1423, 1429-31 (1988). The commonly stated distinction is that "if the penalty is to compensate the complaining party or to

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[Footnote continued from previous page]
period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

coerce the defendant into complying with the court's orders, the contempt is civil, while if the penalty is punitive, intended to vindicate the authority of the court, then the contempt is criminal." Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 781-82 (8th Cir. 1987), citing United Mine Workers, 330 U.S. at 302-04. See also Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336, 1343 (3rd Cir. 1976). As a result, "the penalties arising cut of adjudications of criminal contempt are generally an absolute fine of a specific amount or a determinative period of confinement." Id.

While the bankruptcy court found Mr. Gould to be in criminal contempt, it appeared to intend a coercive as well as a punitive sanction. While we adopt the Bankruptcy Court's findings, we now find Theodore B. Gould to be in civil contempt

of court.[6] See Shillitani, 86 S. Ct. at 1535 (parties had briefed the issues with reference to criminal contempt, but "the contempt orders were remedial, and therefore might well be deemed civil in nature rather than criminal.")

By the order of this Court we direct Mr. Gould to comply fully with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee the $67,500 sales proceeds received in the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1000 in expenses incurred in consummating the sale. Mr. Gould shall comply with the terms of the Order of this Court within seven (7) days of the date of this order. The

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[6] We take no position at this time on the merits of a criminal contempt finding with respect to Mr. Gould.

failure to comply fully and timely with the Order of this Court shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day Mr. Could may fail to comply. It is therefore

ORDERED and ADJUDGED that the Motion by Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, is hereby GRANTED and Mr. Gould is directed to comply with the Order of this Court in the manner prescribed by this Court.

DONE AND ORDERED at Miami, Florida, this _____ day of May, 1991.

STANLEY MARCUS
UNITED STATES DISTRICT
JUDGE SOUTHERN DISTRICT
OF FLORIDA

cc: Counsel of record

Theodore B. Gould
2564-B Ivy Road
Charlottesville, VA 22901

APPENDIX C

App 28a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Appellee.

IN RE: HOLYWELL CORPORATION et al.,

Debtors.

ORDER
DENYING STAY AND REHEARING

THIS CAUSE comes before the Court upon Appellant Theodore B. Gould's Motions for

Stay, Rehearing, and Granting Judicial Notice. For the reasons detailed below, the Motion for Stay is DENIED, the Motion for Rehearing is DENIED, and the Motion for Granting Judicial Notice is GRANTED. By Order entered on May 17, 1991, we granted the Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, and we specifically directed Mr. Gould to comply with the August 1, 1989 Order of the Bankruptcy Court in so far as it directed him to turn over to the Liquidating Trustee $67,000 in sales proceeds received in the sale of certain concrete pumps and related equipment, together with any interest earned on or since the time of sale, less $100 in expenses incurred in consummating the sale. Mr. Could was directed to comply with the Order of May 17 within seven days.

Appellant's Motion for Stay is now premised on the granting of a writ of certiorari issued by the Supreme Court on May 28, 1991. The Supreme Court granted certiorari on a lawsuit arising from the same bankruptcy proceedings which are the foundation of the instant case. See In re Holywell Corporation, 911 F.2d 1539 (11th Cir. 1990), cert. granted Holywell Corp. v. Smith, 114 L.Ed.2d 476, 59 U.S.L.W. 3793 (1991). On appeal from the bankruptcy court, the federal district court determined that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties. The Eleventh Circuit Court of Appeals affirmed the district court. The Supreme Court agreed to consider that

question. However, the tax issue, we believe, lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, "[t]he question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps." Order at 6. We did not premise our contempt order upon the bankruptcy court's "agreement with the trustee that he is not responsible for the payment of the federal income taxes," Appellant's Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. Id. Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because "Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation

of a court order." See Order of May 17, 1991, at 6.

Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust

asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in civil contempt of court and directed to comply. We have heard nothing new or different and accordingly, we believe the Motion for Stay should be DENIED.

We also note that Mr. Gould has failed to address the ordinary requirements for obtaining a stay. See Garcia-Mir v. Meese, 781 F. 2d 1450 (11th Cir. 1986). These criteria include: (a) whether the movant has demonstrated a likelihood of success on the merits; (b) whether the movant has a made a showing of irreparable injury if the stay is not granted; (c) whether the non-moving party will be injured if the stay is granted; and (d) whether the public interest will be served by granting the

stay. All four requirements must be met. Mr. Gould does not meet even the first. Given that he has admitted that he took the property of the Trust without permission and that he diverted proceeds from the sale of such property for his personal use, he has little likelihood of success on reversing the contempt order. On this basis alone we would deny the motion for stay. In addition, we note that no stay should be granted unless it is conditioned on the posting of a supersedeas bond for the amount of the sale proceeds plus twice the statutory rate of interest. See Fed. Rule of Civ. P. 62(d); Fla. R. App. P. 9.310(b)(2); Fla. Stat. § 55.03 (1981). See also Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969) (appeal from order confirming judicial sale was dismissed as moot for failure to comply with this rule allowing appellant to obtain a stay by

giving a supersedeas bond); United States v. Jenkins, 153 F. Supp. 636 (S.D. Ga. 1957) (Defendant who appealed from judgment but did not tender supersedeas bond in amount of judgment subjected himself to action brought by plaintiff to enforce judgment while appeal was pending in court of appeals and in the United States Supreme Court.).

We add that Mr. Gould's statement that he cannot comply with the Court's Order because he has used the funds which he was required to return to appeal the tax obligation issue has no bearing on the basis for which Mr. Could was held in contempt. Furthermore, such representation conflicts directly with those he made in proceedings before the bankruptcy court at which time he stated that the proceeds from the sale of the concrete pumps had been invested "in GMAC 30 day paper at 9.21

percent interest." Transcript from Hearing of Fred Stanton Smith, Trustee, on Motion for Contempt, July 27, 1989, at 63, lines 15-19. At the same hearing, Mr. Gould refused to identify the brokerage firm at which the account was held. Id. at lines 24-25. Mr. Gould next stated that

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65. No where does Mr. Gould indicate that he planned to expend the very funds at issue to appeal the question the resolution of which he stated would await before turning over the funds. His comments in bankruptcy court almost two years ago illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump

sales. We find no basis in Mr. Gould's Motion for Rehearing to alter our Order of May 17, 1991. Finally, as the above discussion indicated, this Court has taken notice of the grant of certiorari by the Supreme Court in Holywell Corp. v. Smith, 911 F.2d 1539.

Accordingly, for the foregoing reasons,

Theodore B. Gould's Motion for Stay is DENIED, his Motion for Rehearing is DENIED, and his Motion for Granting Judicial Notice is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this ____ day of June, 1991.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

App 38a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER
FINDING THEODORE B. GOULD IN CONTEMPT

THIS CAUSE having come on to be heard on July 27, 1989, upon Motion for Contempt and other relief filed by the Liquidating

Trustee, and the Court having reviewed the pleadings on file, having heard argument of counsel, and having reviewed a stipulated set of facts agreed to by the parties involved, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. In October 1981, THEODORE B. GOULD purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became property of his estate pursuant to 11 U.S. Code, Section 541(a). Thereafter, pursuant to the terms of the confirmed Plan of Reorganization, the concrete pumps and related equipment became the property of the MIAMI CENTER LIQUIDATING TRUST.

2. In 1989, THEODORE B. GOULD was contacted by Lawrence G. McMillan, who was interested in buying the concrete pumps and

related equipment. Before the sale was consummated, MR. GOULD was notified the Liquidating Trust claimed the right to receive the sale proceeds. MR. GOULD refused to allow the sale proceeds to be paid to the Liquidating Trustee and insisted the contract for the sale of the concrete pumps and related equipment be made in his name, and that payment for the concrete pumps and related equipment be paid to him.

3. Thereafter, by Agreement dated June 2, 1989, THEODORE B. GOULD contracted to sell the concrete pumps and related equipment to Lawrence G. McMillan for $67,500.00. The funds were paid to MR. GOULD

4. The funds are presently held by MR. GOULD in his name at a brokerage firm and have been invested in short-term commercial paper. MR. GOULD refuses to

reveal the brokerage firm, refuses to turn the money over to the Trustee and has stated he will not obey any order of this Court to do so.

5. Upon the foregoing facts, the Court finds and determines that THEODORE B. GOULD is required to turn over to the Liquidating Trustee the $67,500.00 sale proceeds received, together with any interest earned, less $1,000.00 in expenses incurred in consummating the sale, together with any interest that may have been earned on the sale by no later than 5:00 P.M. on Monday, July 31, 1989.

7. If MR. GOULD should fail to deliver to the Liquidating Trustee the funds described above, then in that event the Court fines THEODORE B. GOULD the sum of $1,000.00 for each day from and including August 1, 1989, until the funds are delivered as ordered. The fine will

continue until the Order is obeyed. The fine is payable into the Court Registry. The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order, given the persistent and deliberate refusal of the Defendant, THEODORE B. GOULD to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee. See United Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677, 91 L.Ed. 884 (1947); and in re: Chase and Sandborn Corp. ___ F.2d (11 Cir. May 1989) (slip sheet opinion at pages 2365-66).

8. If THEODORE B. GOULD shall fail and refuse to deliver over the monies as ordered by Friday, August 4, 1989, then in that event, in addition to the $1.000.00 a day fine referred to above, the Court further finds and certifies to the United

States District Court that THEODORE B. GOULD is in contempt of this Court and its Orders by his failure and refusal to comply with its Orders concerning payment of monies to the Trustee. THEODORE B. GOULD should be punished by the continued imposition of the fine set out in this Order and by a period of incarceration not to exceed ten (10) days (or until compliance, whichever first occurs).

9. The Court further finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the Court on July 27, 1989, and has announced his intention not to do so.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida this _____ day of _____, 1989.

_____
SIDNEY M. WEAVER
United States Bankruptcy Judge

Herbert Stettin, Esquire, upon receipt wil immediately mail conformed copies of this Orde to all attorneys of record.

BEST AVAIL

APPENDIX E

App 45a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590/91/92/93/94 BKC-SMW

HOLYWELL CORPORATION, et al.

Debtors.

ORDER

CERTIFYING THEODORE B. GOULD TO BE IN CONTEMPT

The Court having previously entered on order dated August 1, 1989, finding Theodore B. Gould in contempt upon the grounds stated therein, and having provided in said Order that Theodore B. Gould would have until Friday, August 4, 1989, within which to comply with the Order of the

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Court, and the Court being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED AS FOLLOWS:

1. All of the terms, findings and conclusions contained in the Order of August 1, 1989, finding Theodore B. Gould in contempt be and they are hereby adopted, and incorporated is if set forth herein. A copy of the Order finding Theodore B. Gould in contempt dated August 1, 1989, is attached hereto is an exhibit to this order.

2. By Affidavit of Herbert Stettin, the attorney for Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust. The Court has been advised that Theodore B. Gould has failed and refused to comply with the Court's Order of August 1, 1989, within the time permitted by the Court.

3. As provided in Rule 9020, Rules of Bankruptcy Procedure, this Order is entered for the purpose of certifying to the United States District Court that Theodore B. Gould is in contempt of this Court and should be punished as provided in the Order of August 1, 1989, a copy of which is attached hereto as Exhibit 1.

DONE AND ORDERED IN CHAMBERS, MIAMI, FLORIDA, THIS _____ DAY OF AUGUST, 1989.

_____
United States Bankruptcy Judge

conformed copies:
Herbert Stettin, Esquire
upon receipt will immediately
mail conformed copies to
all counsel of record.

and

Robert M. Mark, Esquire
Theodore B. Gould, pro se
(Sent directly by Court)

APPENDIX F

App 48a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND

FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

MOTION FOR CONTEMPT AND OTHER RELIEF

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), moves the Court for an order certifying Theodore B. Gould

as being in contempt of this Court and for other sanctions, and says:

1. This case pends as a consolidated confirmed Chapter 11 proceeding in which Theodore B. Gould is one of the Chapter 11 Debtors.

2. On information and belief, the Liquidating Trustee has been advised, and therefore alleges, that at some time Prior to the filing of the Chapter 11 cases, Theodore B. Gould paid for and acquired two concrete pumps which were used in the construction of the Miami Center. On the filing of the Chapter 11 proceedings in August, 1984, these pumps became property of the estate, as provided in Section 541(a) of the Bankruptcy Code. At confirmation of the Plan of Reorganization, these pumps became property of the Liquidating Trust, as provided in the plan.

3. Thereafter, the pumps remained stored at the premises of the Miami Center after the sale of the property to the nominee of the Bank of New York.

4. In February 1989, the attorney for the Bank of New York demanded of the Liquidating Trustee that he move the concrete pumps from the premises. A copy of the demand letter of February 17, 1989 is attached hereto as Exhibit A. The Liquidating Trustee contacted Theodore B. Gould to determine whether the pumps were in fact stored on the bank's property. The Liquidating Trustee's response of February 28, 1989 is attached hereto as Exhibit B.

5. Thereafter, by letter dated March 6, 1989, the Bank of New York's nominee demanded the Liquidating Trustee pay the personal property taxes for the concrete pumps in question. A copy of the

demand letter and 1988 personal property tax notice is attached hereto as composite Exhibit C.

6. A prospective purchaser named Lawrence McMillan, representing C.P.I. of Kansas City, Kansas, expressed interest in the concrete pumps for a construction job with which he was involved. The Liquidating Trustee referred Mr. McMillan to Edgar Schumacher of Holywell Corporation to discuss a purchase price.

7. On or about June 1, 1989, Mr. McMillan and his local attorney, Brad Lotspeich, advised the liquidating Trustee that a price of $67,500.00 had been agreed upon between Mr. McMillan and Mr. Gould, and that Mr. Gould had shown them his canceled personal check issued prior to the filing of the petition initiating these proceedings as evidence that he paid for the concrete pumps in question. Mr. Gould

further advised Mr. McMillan that he was only willing to proceed with the transaction if they would deliver to him a cashier's check payable to him individually for the purchase of the concrete pumps. Mr. McMillan and his attorney asked the Liquidating Trustee whether the Liquidating Trust had any continuing interest in the pumps. The Liquidating Trustee advised them of the interest of the Liquidating Trust. Mr. McMillan and his attorney advised the Liquidating Trustee they had spoken with Mr. Gould concerning this and Mr. Gould had said he would not enter into the agreement to sell the concrete pumps if he did not receive the funds.

8. Thereafter, the Liquidating Trustee was advised that on June 5, 1989 the sale was consummated and Mr. McMillan, as Trustee, had paid $67,500.00 in the form of a cashier's check to Theodore B. Gould

as payment of the concrete pumps. A two page contract in the form of a bill of sale was executed to evidence the sale. The Liquidating Trustee does not yet have a copy of the agreement but is attempting to obtain one.

9. The concrete pumps are the property of the Liquidating Trust. Mr. Gould was well aware of the ownership interest of the Liquidating Trust in this property and chose to dispose of this property for the express purpose of receiving the proceeds therefrom. Mr. Gould explained to the Liquidating Trustee that he would not permit any of the proceeds to be paid to the Liquidating Trust, or to be held by the Liquidating Trust, so long as the Liquidating Trustee failed or refused to pay income tax liabilities owed by the Debtors. As the Court is well aware, there is a final

judgment in adversary proceeding 87-0627-BKC-SMW-A determining the Liquidating Trust has no obligation to file tax returns or pay income taxes owed by the Debtors.

10. Theodore B. Gould holds $67,500.00 that belongs to the Liquidating Trust and he should be required to pay over these sums immediately. His receipt of these monies is a willful and deliberate attempt to interfere in the operation of the Liquidating Trust. It is the latest in a series of acts designed to disobey this Court's orders, frustrate the Liquidating Trustee from completing his responsibilities under the terms of the plan, and is a violation of the Bankruptcy Code and his contractual responsibilities.

11. At an earlier stage in these proceedings, such conduct would have been sufficient to bar his discharge. At this

stage in the proceedings, in addition to such other relief as would be appropriate, the Liquidating Trustee seeks an order certifying Theodore B. Gould as being in contempt of this Court's Order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code. Mr. Gould has converted to his own use property of the Liquidating Trust. Because his conduct was willful and designed to deliberately frustrate the operation of the Liquidating Trust, and because this is the latest in a series of acts designed to frustrate the operation of the Liquidating Trust, it is appropriate that the punishment recommended by the Court should include effective means to punish this willful misconduct and to deter future misconduct.

12. In addition to such other relief as the Court deems appropriate Mr. Gould

should be fined on a daily basis until these funds have been restored to the Liquidating Trust.

WHEREFORE, the Liquidating Trustee moves the Court for an order certifying Theodore B. Gould as being in contempt, and for such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

_____

Herbert Stettin, Esquire

APPENDIX G

App 57a

IN THE

UNITED STATES BANKRUPTCY COURT

THE SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

In re:

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES
HOLYWELL CORPORATION and
THEODORE B. GOULD

OBJECTIONS TO ORDER OF CONTEMPT

Theodore B. Gould, pro se, ("Objector") files the following objections to the Order Finding Theodore B. Gould In Contempt ("Contempt Order"), entered by the

bankruptcy court on August 1, 1989. These objections are filed pursuant to Bankruptcy Rules 9020 and 9033 for the purpose of obtaining de novo review of the Contempt Order by the United States District Court for the Southern District of Florida.

In accordance with Bankruptcy Rule 9033, Objector objects to the following specific findings or conclusions in the Contempt Order on the grounds stated below:

1. The Trustee has no interest in the property of Theodore B. Gould's bankruptcy estate, the subject concrete pumps or the proceeds from the sale of such pumps on June 2, 1989.

(a) The bankruptcy court lacked the statutory authority to appoint a trustee after confirmation and vest title to the property of Theodore B. Gould's estate in a trustee, relieving such Trustee

of the duty to discharge requirements of law, specifically, inter alia, the payment of federal and state income taxes on behalf of Theodore B. Gould's bankruptcy estate.

(1) It is a fundamental principle in defining the jurisdiction of courts created in accordance with the constitutional arrangement of political institutions in the United States that the jurisdiction of such courts is defined by act of Congress and to the degree that the powers and authority of courts of the United States inferior to the Supreme Court have not been supplied by written law, their judgments not based upon such specifically defined powers are null and void.

The Supreme Court recently restated this fundamental principle in Finley v. The United States, 57 L.W. 4557 (U.S. May 22, 1989):

"In 1807 Chief Justice Marshall wrote for the Court that 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.' Ex parte Bollman, 4 Cranch 75, 93 (1807). It remains rudimentary law that '[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it....To the extent that such action is not taken, the power lies dormant.' The Mayor v. Cooper, 6 Wall. 247, 252 (1868) (emphasis added); accord, Christianson v. Colt Industries Operating Co., 486 U.S. ___ ___ (1988); Firestone Tire & Rubber Co. v. Risjor'd, 449 U.S. 368, 379-380 (1981); Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922); Case of the Sewing Machine Companies, 18 Wall. 553, 577-578, 586-587 (1874); Sheldon v. Sill, 8 How. 441, 449 (1850); Cary v. Curtis, 3 How, 236, 245 (1845);

McIntire v. Wood, 7 Cranch 504, 506 (1813)." [Emphasis added]

(2) Any individual appointed and designated a trustee[1] by a court of the

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[1] Article V, Creation of Trust, paragraph 1 provides:

> "1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the 'Miami Center Liquidating Trust'."

Reference to Mr. Smith as a "liquidating" trustee is a misnomer. The term "liquidating" trustee was introduced into the proceedings in response to the debtors' objections, filed on April 11, 1985, to the

[Footnote continued on next page]

United States is required to discharge the common law duties of a fiduciary and the requirements of law imposed upon a trustee. If Mr. Smith had been appointed a trustee

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[Footnote continued from previous page] feasibility of the Bank of New York's proposed Consolidated Plan of Reorganization, and was for the specific purpose of avoiding the payment of federal and state income taxes incurred during the administration of the estate and arising from the proposed sale of the Miami Center. The Bank of New York's attorneys and counsel for the Unsecured Creditors' Committee introduced the term "liquidating" trustee in reliance upon the Eleventh Circuit's conclusion in Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir.), cert. denied 472 U.S. 1010 (1985) that a trustee engaged in a liquidation process is not "conducting any business" within the meaning of 28 U.S.C. Section 960 and thus does not incur tax liability.

The Supreme Court has, however, recently reversed the decisions of the various circuit courts of appeal which had found such reasoning persuasive and, citing the legislative history of 28 U.S.C. Section 960, concluded in California State Board of Equalization v. Sierra Summit, Inc., 57 U.S. L.W. 4639 (June 12, 1989), that any receiver, assignee, trustee, manager, liquidator or other officers or agents appointed by any United States court is subject to all federal, state and local taxes applicable to such business.

in accordance with Section 1104(a), 11 U.S.C. Section 1106(a)(1), (3),[2] (6),[3] and (7)[4] would have specified his duties,

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[2] 11 U.S.C. Section 1106(a)(3) provides as follows:

"(a) A trustee shall --

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;"

[3] 11 U.S.C. Section 1106(a) (6) provides as follows:

"(a) A Trustee shall --

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;"

[4] 11 U.S.C. Section 1106(a) (7) provides

[Footnote continued on next page]

including filing tax returns on behalf of Theodore B. Gould's bankruptcy estate and payment of the income taxes incurred.

Since the statutory authority of a bankruptcy court is specifically defined in the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, if such court has the authority to appoint a trustee after confirmation for the purpose of carrying out the Plan in accordance with 11 U.S.C. Section 1142(a), the duties of such trustee and the professional persons in his employ as attorneys and accountants must be subject to the bankruptcy statutes and rules, common law, and applicable

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[Footnote continued from previous page] as follows:

"(a) A Trustee shall --

(7) after confirmation of a plan, file such reports as are necessary or as the court orders."

non-bankruptcy laws, including the Internal Revenue Code.

(b) The creation of the Miami Center Liquidating Trust and the appointment of Fred Stanton Smith, as Trustee of said Trust, was for the unlawful purpose, inter alia, of avoiding the payment of federal and state income taxes. The net sale proceeds of the concrete pumps $66,500 plus accrued interest represent taxable income to Theodore B. Gould's estate for the calendar year ending December 31, 1989, and the Trustee has denied responsibility for making the income tax return and payment of the taxes payable as a statutory liability.

(1) On April 28, 1988, the bankruptcy court entered an order relieving the Trustee of the responsibility for making the income tax returns and paying the income taxes incurred during the

administration of Theodore B. Gould's bankruptcy estate.

(2) On July 31, 1988, on appeal before the district court in the United States of America v. Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, et al, and Holywell Corporation, Theodore B. Gould, et al. v. Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, consolidated Case Nos. 88-0795-Civ-Kehoe and 88-1053-Civ-Kehoe, entered a Memorandum Opinion affirming the bankruptcy court's decision relieving the Trustee of the responsibility for the payment of income taxes for the corporate estate of Holywell Corporation, and for Theodore B. Gould's bankruptcy estate, concluding relevant to Theodore B. Gould's objections as follows:

> "...the Liquidating Trustee is a contract trustee, rather than a 'trustee in a case under title 11';...."

> "...the bankruptcy court ruled that the Liquidating Trust is a grantor trust and...a grantor may be taxed individually as the owner of the trust. If the trust income is, 'or in the discretion of the grantor or non-adverse party, or both may be' applied to discharge a legal obligation of the grantor.... As a non-adverse party within the meaning of the Code...the Liquidating Trustee is authorized to use the Trust income to discharge the debtors' legal obligations. As such, the debtors may be taxed as grantors...." [Emphasis added]

(c) Fred Stanton Smith is a "contract" trustee appointed in accordance with Article V, Creation of Trust, of the confirmed Plan of Reorganization proposed by the Bank of New York and adopted for the sole benefit of the Bank of New York and third-party creditors.

(d) The Trustee was appointed after confirmation without satisfying the statutory requirements of 11 U.S.C. Section 1104(a). Theodore B. Gould has been discharged as an individual debtor in

accordance with Section 1141, and cannot be required to perform duties under an unlawful contract to which he did not consent.

(e) Since the Trustee is not the statutory successor to Theodore B. Gould's Section 541(a) assets, and the equitable powers of a bankruptcy court are limited to the application of the principles of equitable subordination in accordance with 11 U.S.C. Section 510(c) related to the determination of the hierarchical priorities in the allowance of claims involved in restructuring debtor-creditor relations, any rights of contract or of property the Trustee claims must be adjudicated in an Article III court, capable of satisfying Theodore B. Gould's right to a jury trial. See Granfinanciera, S.A., et al.. v. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corp.,

FKA, General Coffee Corp., (In re Chase & Sanborn), 57 L.W. 4898 (U.S. June 23, 1989).

(1) The subject Order Finding Theodore B. Gould In Contempt, entered on August 1, 1989, was based upon a Motion For Contempt, filed by Herbert Stettin, Esq., the Trustee's attorney, alleging that Theodore B. Gould has breached his "contractual responsibility" to the Trustee and has engaged in a fraudulent conveyance. Mr. Gould has denied that he has any contractual responsibility to the Trustee with respect to the Plan's implementation by means forbidden by law, specifically the avoidance of federal and state income taxes.

(2) The bankruptcy court's appointment of Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust, after confirmation, which purported

to vest title and possession of the debtors' property in said Trustee, in accordance with the provisions of the confirmed Plan, proposed by the Bank of New York on behalf of the debtors, while relieving the Trustee of the statutory duty to make the income tax returns and pay the income taxes of Theodore B. Gould's bankruptcy estate is unlawful. Thus, ab initio, each and every act of the Trustee from the inception of his appointment is null and void.

2. The bankruptcy court's jurisdiction is limited to the allowance or disallowance of claims as part of a process of restructuring debtor-creditor relations. Id., 57 L.W. 4905. The value or sale proceeds of the concrete pumps was not specifically enumerated as an asset required for the Plan's implementation in

Article IV, Means For Execution Of The Plan.[5]

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[5] Article IV, Means For Execution Of The Plan, of the confirmed Plan states in relevant part as follows:

"Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.
(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee.....

Upon the passing of title of Miami

[Footnote continued on next page]

3. The various courts of appeal have adopted the general rule that the predicate of a bankruptcy court's jurisdiction is the possession of property, and upon

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[Footnote continued from previous page]
Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors."

Vance Salter, Esq., attorney for the Bank of New York, specified the means available for the Plan's implementation on May 31, 1985, in a hearing related to the availability of funds for payment of the Miami Center Joint Venture's claim, as follows:

> "...We are offering to pay $19 million, the difference between the adjudicated amount of our lien...and to release our collateral $31 million net of some expenses [i.e., the court authorized 'super-priority' loans], which your Honor has approved previously, maybe $28 million remaining now. So we are offering to release in essence, and put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, all of the creditors in these estates $47 million."

"substantial consummation" in accordance with 11 U.S.C. Section 1101(2) transferring the estate's property to the entity formed for the purpose of carrying out the plan,

> "The jurisdiction of the bankruptcy court over the property is generally said to terminate and does not follow it, [except to the extent that]... the bankruptcy court may nevertheless exercise jurisdiction 'over a dispute involving the rights and priorities of private parties after a sale where the dispute involves a review and clarification of the bankruptcy proceedings leading to the sale.' [Citation omitted] Similarly, the bankruptcy court may not, as a general rule, adjudicate disputes between third parties not involving the bankrupt or his property, Evarts v. Elroy Gin Corp., 204 F.2d 712, 717 (9th Cir. 1953), but it may determine third-party disputes when necessary to administer the estate completely. O'Dell v. United States, 326 F.2d 451, ,455 (10th Cir. 1964)."[6] [Emphasis added]

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[6] In re Samoset Associates, 654 F.2d 247, 253 (1st Cir. 1981).

A bankruptcy court has limited jurisdiction and its "... power to act must be found expressly or impliedly in the Bankruptcy Act."[7] Bankruptcy courts lack jurisdiction over controversies not involving claims against the debtor or its property and controversies in which the bankrupt and its unsecured creditors have no interest.[8]

4. The authority of the bankruptcy court to hold Theodore B. Gould in contempt for discharging a responsibility required by law and his fiduciary duty depends entirely on whether the bankruptcy court's order "... was in whole or in part beyond the power of the court...[and] was in

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[7] First State Bank and Trust Co. v. Sand Springs State Bank, 528 F.2d 350, 353 (10th Cir. 1976).

[8] Matter of Paso Del Norte Oil Co., 755 F.2d 421, 425 (5th Cir. 1985), citing Nixon v. Michaels, 38 F.2d 420, 424 (8th Cir. 1930).

excess of jurisdiction, was void, and the court [has] no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision..."[9] The Supreme Court of the United States has uniformly held as applied to the limits upon the authority of a court of the United States to exercise its contempt power:

> "When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void....A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity."[10] [Emphasis added]

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[9] Ex Parte Rowland, 104 U.S. 604 (1881).

[10] Ex Parte Terry, 128 U.S. 289, 305 (1888), quoting Ex Parte Fisk, 113 U.S. 713, 718.

The bankruptcy court has misconstrued the Supreme Court's opinion in United Mine Workers as applied to finding Theodore B. Gould in contempt and imposing sanctions upon him for performing his duty as required by law. United Mine Workers stands for the following rule:

> "The right to remedial relief falls with an injunction which events prove was erroneously issued...[citations omitted] and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court."[11]

5. The contempt power of federal courts is defined in 18 U.S.C. Section 401, which states as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

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[11] United States v. United Mine Workers of America, 330 U.S. 258, 295 (1946).

> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree, or command."

Thus, although the contempt power is inherent in the "judicial power" vested in courts of the United States,[12] it is subject to limits imposed by act of Congress:

> "...the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper...."[13]

The Constitution of the United States is based upon the fundamental principle that it is a right of the individual to have open access to the courts and impartial judgment, insuring a lawful

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12 Ex Parte Robinson, 86 U.S. 505, 511 (1873).

13 Gompers v. Bucks Stove & Range Company, 221 U.S. 416, 445 (1911).

remedy for injuries to person and property. It is the duty and obligation of the courts to insure that justice prevails. This constitutional guarantee secures the individual against the arbitrary acts and usurpation of power of any office holder.

> "It insures the right of every person...to seek remedy by [the actions of a court of competent jurisdiction] for any injuries done to him in his person or property and entitles him to have justice administered according to law without denial or delay. In other words, it assures a litigant the right to prosecute an action, provided he prosecutes it as contemplated by law." 16A C.J.S. Section 708. Constitutional Law, XIII. Right To Justice and Remedy For Injuries.

The due process clause "...is a restraint on the legislative as well as on the executive and judicial powers of the government...."[14] The Bill of Rights is based upon the principle that the

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[14] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856).

Constitution deprives the individual and States of specifically enumerated powers granted to Congress for the purpose of enacting laws in accordance with Article I, Section 8, to the President for the execution of the Laws of the United States, and to the judiciary for the administration of the Laws of the United States. The 9th and 10th Amendments insure that powers not specifically enumerated in the Constitution to Congress, the President, and the judiciary, shall not be construed as denying or disparaging rights retained by the people, including, most importantly, the right of redress of wrongful injury in a court of competent jurisdiction.

Theodore B. Gould denies that the procedural requirements of due process have been satisfied for the bankruptcy court's finding in paragraph 9, certifying Theodore B. Gould committed criminal

contempt in the presence of the court "... both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure."

Bankruptcy Rule 9020(b) provides:

> "Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists."

The Order setting the contempt hearing and the Motion For Contempt upon which the bankruptcy court's Order Finding Theodore B. Gould In Contempt specifically state that:

> "The essential facts constituting the alleged contempt charge are contained in the motion and are adopted herein. The contempt charge is civil."

The bankruptcy judge did not see or hear conduct constituting criminal contempt in his actual presence on July 27, 1989, and did not exercise his power in accordance with Bankruptcy Rule 9020(a)(1) to summarily punish Theodore B. Gould.

The Order entered on August 1, 1989 is without notice and hearing stating the essential facts constituting the criminal contempt charged and describing the contempt as criminal, in accordance with the requirements of Bankruptcy Rule 9020(a)(2). Theodore B. Gould was not allowed a reasonable time for preparation of a defense against a charge of criminal contempt and the essential facts upon which the Motion For Contempt was filed provide a basis only for civil contempt, if the bankruptcy court had jurisdiction in personam to enjoin or restrain Theodore B. Gould for refusing to comply with an order which that court had no authority to make.

For the foregoing reasons, Objector requests that the district court reject the proposed Contempt Order by the bankruptcy court and enter an Order dismissing with

prejudice the contempt proceeding filed by the Trustee.

Respectfully submitted,

THEODORE B. GOULD, pro se
2464-B Ivy Road
Charlottesville, VA 22901
(804) 295-7125

By: _____
Theodore B. Gould, pro se

APPENDIX H

App 83a

IN THE

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

RESPONSE TO
OBJECTIONS TO ORDER OF CONTEMPT

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), submits this Response to Objection to Order of Contempt,

in accordance with Bankruptcy Rule 9033(b), and says:

1. Mr. Gould's objections to the bankruptcy court's order of contempt arising out of Mr. Gould's sale of certain trust assets (the concrete pumps) are, for lack of better words, objectionable and contemptuous themselves. The arguments made ignore the law of the case and a decent respect for the courts which have administered this case.

2. Mr. Gould's statement that the "Trustee has interest in the property of Theodore B. Gould's bankruptcy estate, the subject concrete pumps or the proceeds from the sale of such pumps on June 2, 1989" (Objection to Order of Contempt at 1) is Alice In Wonderland talk. The plan of reorganization, as confirmed, unequivocally states that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy

Code, are assets of the Miami Center Liquidating Trust. Mr. Gould has already stipulated in open court that the pumps are 541(a) assets. That plan has been confirmed and is the law of this case. See Holywell Corporation v. The Bank of New York, 59 B.R. 340 (S.D. Fla. 1986), dismissed as moot sub nom, Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988), certiorari denied, ____U.S.____, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). Mr. Gould's petition for writ of mandamus was also denied. In re Theodore B. Gould, ____U.S.____, 109 S.Ct. 198, __L.Ed.2d__ (1988). Mr. Gould's collateral attack on the plan should not be permitted.

3. Equally worth noting is Mr. Gould's assertion that the bankruptcy court lacks jurisdiction over him. Every court in which Mr. Gould has raised this

issue has rejected it. The Liquidating Trustee refers to and relies upon the voluminous record in these proceedings rather than go through the oft-used and successful rebuttal to Mr. Gould's contortions of the law.

4. Mr. Gould further argues that reference to Mr. Smith as "Liquidating Trustee" is a misnomer (Objections to Order of Contempt at 3, n.1). This contention is specious. Even Mr. Gould's wholly-owned and controlled subsidiaries refer to the "Liquidating Trustee" as such in five (5) lawsuits filed in the United States District Court for the Western District of Virginia.

5. In the same footnote, Mr. Gould goes on to misstate the holding of California State Board of Equalization v. Sierra Summit, Inc., 57 U.S.L.W. 4639 (June 12, 1989), which has no applicability

to the issues herein. The correct holding of Nierra Summit is: "Nothing in the plain language of the statute 28 U.S.C. Section 960], its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankrupt estate." 57 U.S.L.W. at 4641 (emphasis supplied). The issue was whether a state sales tax could be imposed on a liquidation sale of bankruptcy estate assets.

6. Mr. Gould claims he "cannot be required to perform duties under an unlawful contract to which he did not consent." (Objection to Order of Contempt at 6). It is this statement which best exemplifies Mr. Gould's contemptuous conduct. The plan is binding on him, regardless of his opinions as to the plan's validity, and regardless of whether he

voted to accept it. See In re Blanton Smith Corporation, 81 B.R. 440 (Bankr. M.D. Tenn. 1987); In re Sanders, 81 B.R. 496 (Bankr. W.D. Ark. 1987); In re Monroe Well Service, Inc., 80 B.R. 324 (Bankr. E.D. Pa. 1987); In re Jartran, Inc., 76 B.R. 123 (Bankr. N.D. Ill. 1987); In re St. Louis Freight Lines, Inc., 45 B.R. 546 (Bankr. E.D. Mich., N.D.1984).

7. Mr. Gould's claim that he can safely convert trust assets because the plan does not require the Liquidating Trustee to pay income taxes defies all logic, particularly where the Bankruptcy Court and the District Court have held the law imposes no duty on the Liquidating Trustee to file tax returns or pay federal income taxes under the facts of this case.

8. Further, Mr. Gould's claim that he can ignore court orders he deems null and void if the orders violated in fact are

determined by the courts to be erroneous is misplaced. Firstly, the confirmation of the Plan is beyond attack. Secondly, a person must obey a court order even if the order is invalid, Lindsey v. Ipack, 732 F.2d 619, 622 (8th Cir. 1984), for the remedy is to appeal the order and obtain a stay. Maness v. Meyers, 419 U.S. 449 458-59, 95 S.Ct. 591, 42 L.Ed.2d 574 (1984). Mr. Gould and the other debtors that he controls cannot disobey orders of the courts they consider to be invalid without suffering the consequences.

9. Mr. Gould's complaint that the Order of Contempt found him in criminal contempt and that he was denied due process because the motion for contempt only charged civil contempt is unfounded. The Order of Contempt finds Mr. Gould in contempt under Bankruptcy Rules 9020(a) and (b). No where is criminal contempt found.

Theodore B. Gould, appearing pro se, submits the following comments in reply to the "Response To Objections To Order Of Contempt," filed on August 21, 1989, by Herbert Stettin, Esq., ("Stettin") on behalf of Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust ("liquidating trustee")[1]:

1. Notwithstanding Mr. Stettin's response that various judges of the United States District Court for the Southern District of Florida have concluded that the bankruptcy court has authority to exercise jurisdiction over Theodore B. Gould as a discharged debtor after confirmation, Response, p. 2, the controlling law and rule of decision with respect to this cause requires that the first issue which must be

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[1] Reference to the liquidating trustee's "Response To Objections To Order Of Contempt" will be cited as "Response, p. ___."

resolved in this case is whether this Court, or the court below,[2] has the power to undertake by the process of contempt to punish a person for refusing to comply with an order which that court had no authority to make.[3]

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[2] See Birmingham Post Company v. Brown, 217 F.2d 127, 130 (5th Cir. 1954), quoting Mansfield, Coldwater & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884):

> "On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

[3] See Ex Parte Rowland, 104 U.S. 604 (1881): ". . . was [the court's order] in whole or in part beyond the power of the court . . . [and] in excess of jurisdiction, was void, and the court [has] no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision...." [Emphasis added]

See Ex Parte Terry, 128 U.S. 289, 305

[Footnote continued on next page]

It is the liquidating trustee's burden to show that the bankruptcy court has jurisdiction after confirmation over Theodore B. Gould's conduct as a discharged individual debtor and his pleadings must state the facts essential to establish jurisdiction. 217 F.2d 127 at 131.

This case concerns the liquidating trustee's position, upon the advice of counsel, that he is not liable for the payment of income taxes arising from postconfirmation income earned by the fiduciary estates in his custody. Mr. Stettin has relied upon the bankruptcy

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[Footnote continued from previous page] (1888), quoting Ex Parte Fiske, 113 U.S. 713, 718: "When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void....A judgment which lies without the jurisdiction of a court...is, upon reason and authority, a nullity." [Emphasis added]

court's judgment, affirmed by the district court, that no law imposes a duty upon the liquidating trustee to file tax returns or pay federal income taxes,[4] see Response, pp. 3-4.

On September 18, 1990, a panel of the Eleventh Circuit entered a divided opinion, concluding that the liquidating trustee was

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[4] Compare Beaston v. The Bank of Delaware, 12 Pet. 102, 136 (1838): "No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless at the same time, and by the same conveyance, the grantee becomes invested with title.... The moment the transfer of property takes place, under statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust." [Emphasis added] See also 28 U.S.C. Section 960, which provides, in relevant part, as follows:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business as if it were conducted by an individual or corporation."

not responsible for the payment of income taxes on behalf of Theodore B. Gould's individual debtor's estate[5] arising from the sale after confirmation of the insolvent debtor Miami Center Limited Partnership's property. The majority's opinion concluded that the bankruptcy court's administration of the estate ended as an effect of confirmation,[6] In re Holywell, 911 F.2d 1539, 1545 (11th Cir. 1990), and, thus, "the reorganized debtor, not the liquidating trustee is responsible for...taxes," Id, related to income earned

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[5] Compare 26 U.S.C. Section 6012(b)(4) which provides as follows:

> "Returns of an estate, a trust, or an estate of an individual under Chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof."

[6] "Administration of the estate ceases upon confirmation of a plan of reorganization."

from postconfirmation sales of the estate's property.

If the administration of the estate has ended as an effect of confirmation, then the bankruptcy court's authority to exercise jurisdiction over Theodore B. Gould as a discharged debtor must be limited by the plan's provisions and the bankruptcy statutes and rules.[7]

The plan's Article VIII, Duties of The Debtors, [Exhibit A] limits the bankruptcy court's authority to exercise jurisdiction after confirmation over Theodore B. Gould as a discharged debtor for the purpose of "devot[ing] such time and attention to the affairs of the estates as are necessary...to comply with reasonable

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[7] See Reese v. Beacon Hotel Corp., 149 F.2d 610, 611 (2nd Cir. 1945): "...we have repeatedly held that reservation beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court."

requests" of the Bank and liquidating trustee (a) "[i]n connection with the distribution to the creditors of the Washington Proceeds" and (b) "supply[ing] all information" required for the timely prosecution of objections to claims."

2. The second question which this Court must resolve is whether the plan's provisions have granted authority to the liquidating trustee to receive postconfirmation income on behalf of the individual debtor's estate as a "receiver" and use such funds for the payment of timely-filed allowed claims.[8]

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[8] The plan's Article I, Definitions, defines an "Allowed Claim"," in relevant part, as "A Claim...a proof of which is filed within the time fixed...by the court...as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the court...." [Emphasis added]

An "Administrative Claim" is defined, in relevant part, as "A cost or expense of the administration of these Chapter 11 cases, including any actual, necessary expenses of

[Footnote continued on next page]

(a) The bankruptcy court's Confirmation Order, entered on August 8, 1985, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985), concluded that the amended plan filed by the Bank on the debtors' behalf "meets each of the requirements specified in 11 U.S.C. Section 1129(a) and (b)."[9]

Since it is undisputed that the bankruptcy court's appointment of the liquidating trustee did not satisfy the statutory requirements of 11 U.S.C.

[Footnote continued from previous page] preserving the estates and...operating the debtors' business from and after the petition dates, to and including the confirmation date." [Emphasis added]

[9] 11 U.S.C. Section 1129(a)(1) grants a bankruptcy court authority to confirm a plan only if the plan complies with the applicable provisions of title 11. Compare Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York, 913 F.2d 783 (1990), in which the Eleventh Circuit affirmed the district court's reversal of the bankruptcy court's Confirmation Order, having concluded that the plan did not satisfy the Fair And Equitable Standard. 11 U.S.C. Section 1129(b)(1).

Section 1104(a) and his appointment was based upon Section 1123(a)(7),[10] in accordance with the plan's Article V, Creation of Trust, [Exhibit B] p. 20, the bankruptcy court's equitable powers to appoint Fred Stanton Smith as the individual designated Trustee of the Miami Center Liquidating Trust were limited by 11 U.S.C. Section 105(b).[11]

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[10] 11 U.S.C. Section 1123(a)(7) provides that the contents of a plan shall "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any...trustee under the plan...." [Emphasis added]

[11] 11 U.S.C. Section 105(b) provides as follows:

> "Notwithstanding subsection (a) of this section, a court may not appoint a receiver under this title." [Emphasis added]

See also Collier On Bankruptcy, 15th Ed., Vol. 5, Sec. 1104 (1986), citing H. R. Rep. 595, 95th Cong., 1st Sess, 232-34 (1977): "...section 105(b) prohibits the appointment of a receiver ['under any circumstances'] in a title 11 case...."

(b) The Eleventh Circuit's "Mootness" ruling, entered March 10, 1988, directing the district court to dismiss the debtors' appeal of the bankruptcy court's Confirmation Order, Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988), was based upon granting deference of the "clearly erroneous" standard of review to the bankruptcy court's adoption in toto of findings of fact and conclusions of law proposed by The Bank of New York, as the prevailing party, concluding that the plan's substantial consummation precluded granting judicial relief:

> "No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141." [Emphasis added] Id. at 1552.

Since the mandate of the Eleventh Circuit's "mootness" ruling concludes that

Theodore B. Gould, as an individual debtor, was discharged as an effect of confirmation under Section 1141, this Court must determine what assets were revested in the discharged debtor upon confirmation, and specifically whether the concrete pumps, owned by Theodore B. Gould prior to the date of filing, were assigned to the liquidating trustee upon the plan's Effective Date.[12] See 11 U.S.C. Section 1141(b).[13]

11 U.S.C. Section 1141(d)(3) provides that "the confirmation of a plan does not

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[12] See Article V, Creation of Trust:

> "On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors...." [Emphasis added]

[13] 11 U.S.C. Section 1141(b) provides "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

discharge a debtor if (a) the plan provides for the liquidation of all or substantially all of the property of the estate." [Emphasis added] However, the Eleventh Circuit has held that the individual debtor Theodore B. Gould has been discharged and that "the liquidating trustee is not a trustee under title 11, but rather a contract trustee performing limited and essentially ministerial duties," citing In re Alan Wood Steel Co., 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980), for the conclusion that "the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the plan makes him similar to a disbursing agent rather than an assignee or fiduciary." Id.[14]

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[14] See Disclosure Statement, V. MIAMI CENTER LIQUIDATING TRUST [Exhibit C]"

"The Trustee's principal duties

[Footnote continued on next page]

As the court held in Alan Wood, a disbursing agent is not assigned title to the property of a debtor's estate. Although there is no provision in the Bankruptcy Code for the appointment of a "liquidating and disbursing agent," disbursing agents were appointed under Rule 11-38(a) of the Bankruptcy Act of 1898, as amended, requiring the court at the first meeting after acceptance and before confirmation of a plan to designate a person specially appointed to distribute funds specifically deposited as consideration for the payment of claims.

[Footnote continued from previous page]
will be to administer the affairs of the Miami Center, the only operating asset of the Debtors, pending the sale to BNY, to hold title to the remainder of the assets of the Debtors, including the Washington Proceeds, and to supervise diytributions [sic] to creditors...."

In the present case, the plan's Article IV, Means For Execution Of The Plan, see Exhibit D, defines the assets available for payment of claims. The bankruptcy court's "Order Approving Liquidating Trustee's First Report In Conjunction With Consummation Of Confirmed Plan," see Exhibit E, held that the total cash available for the payment of claims in Classes 1, 4, of claims in Classes 1, 4, 5, 6, 7, 8, and 9 was in the amount of $30,423,206.42.

No provision in the plan granted authority to the liquidating trustee to hold and use postconfirmation income for the payment of claims, and 11 U.S.C. Section 105(b) prohibited the bankruptcy court from appointing an agent, for the purposes of carrying out the plan's provisions, granted the powers of a

"receiver" to receive income on behalf of another person's estate.

Furthermore, the Eleventh Circuit's "mootness" ruling was based, in part, on the conclusion that the bankruptcy court had assured itself that the plan provided adequate funds for the payment of claims and that the Feasibility Standard, 11 U.S.C. Section 1129(a)(11), was satisfied:

> "The court also found that it had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its 'fairness, feasibility and propriety'[15] had been verified by

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[15] Compare the Eleventh Circuit's conclusion in In re Holywell, 913 F.2d 783 at ____, affirming the district court's reversal of the bankruptcy court's Confirmation Order:

> "At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. See 11 U.S.C. Section 1129(a)(1) (requiring that the plan comply

[Footnote continued on next page]

> these occurences: administrative claims had been paid or reserved; secured claims had been paid in full; class 3 claims had been paid in full 'undisputed claims in Class 4 through 6 had been paid in full and funds reserved for disputed claims....There remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants...." [Emphasis added] 838 F.2d 1547 at 1552.

The Eleventh Circuit found that the total funds available for the payment of claims was the net proceeds of $12.5 million derived from the sale of the Miami Center and the Washington Proceeds of

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[Footnote continued from previous page] with the provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to MCJV, a creditor who was impaired under, and who has not accepted the plan. See 11 U.S.C. Section 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to classes of impaired claims.)

$30 million.[16] Id. at 1556. The Court found that the liquidating trustee had appeared before the district court and stated that:

> "...he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes." Id.

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[16] On May 31, 1985, Mr. Vance Salter, the Bank's attorney, made the following statement clarifying the means for executing of the plan:

> "...We are offering to pay $19 million, the difference between the adjudicated amount of our lien...and to release our collateral $31 million net of some expenses [i.e., the court-authorized "super-priority" loans], which your Honor has approved previously, maybe $28 million remaining now. So we are offering to release in essence, and put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, all of the creditors in these estates $47 million." [Emphasis added] (Bkrtcy., Transcript, May 31, 1985).

Thus, based upon the trustee's pleadings and the bankruptcy court's order approving the liquidating trustee's First Report, the means available for distribution to creditors and the payment of disputed real property taxes was $42,923,206 and the total payments and reserves required was approximately $34.3 million, leaving a remainder in cash of "some $8 million-$9 million." In fact, the total non-insider claims paid in accordance with the plan's provisions was $20,853,839 and $4,084,000 is required as a reserve, including interest, for the payment of disputed real estate taxes, as of August 31, 1990,

Uniformity of the decisions among the various judges of the United States District Court for the Southern District of Florida requires that this Court grant judicial notice to the judgment of Senior

District Court Judge S. M. Aronovitz in a related case, in which Judge Aronovitz denied the bankruptcy court's contempt orders against Theodore B. Gould for failure to satisfy its orders concerning discovery related to his business conduct after confirmation.[17]

On May 16, 1989, Judge Aronovitz had the following colloquy with S. Harvey Ziegler, the Bank's attorney, pertinent to the issues in this case:

> THE COURT: "...the [Bank of New York] is the one that proposed this flawed plan... and it is a result of that flawed plan that has brought about much of what has happened in the last several years (p. 45)....[W]hy were we led to believe that the assets that were intended by the Plan to be included in the Trust were those specific assets that were described in

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[17] Fred Stanton Smith, as Trustee of the Miami Center Liquidation Trust v. Theodore B. Gould, et al., Nos. 89-0948 and 89-1451-Civ-SMA (S.D. Fla., August 30, 1990).

> and part of the papers that were strewn throughout this court and which appear in my orders as well? Why did it go beyond what was specifically stated in all of those papers?" [Emphasis added]
>
> MR. ZIEGLER: "...it was specifically stated in the Plan that the Plan would use all assets of the Debtors."
>
> THE COURT: "It was not so stated. It did describe that the Plan included all of the assets but it was not so represented to the court that all of the assets would be used or needed in order to satisfy the entire estate. That's two different things." (p. 47) [Emphasis added]

3. The third question which this Court must resolve is related to the position that Mr. Stettin has consistently taken that although various aspects of the confirmed plan do not comply with the provisions of title 11 and applicable nonbankruptcy laws, nevertheless the plan is a contract binding upon Theodore B. Gould.

Mr. Stettin's position raises the application of the Nuremburg Principle -- the constitutional arrangement of the political institutions in the United States preclude the conclusion that a duty could be imposed upon the individual to submit to unlawful orders of a court[18] or any other officeholder of government.

The issues concerning the bankruptcy court's authority to exercise jurisdiction after confirmation over Theodore B. Gould as a discharged debtor and a determination of what assets have been revested as a matter of law are important public policy questions related to the liquidating trustee's position, relying upon the

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[18] There is a serious question concerning the liquidating trustee's lawful authority, since his appointment is based solely upon the creation of a creditors' trust under the provisions of a plan which do not comply with provisions of title 11. 11 U.S.C. Section 1129(a)(1); In re Holywell, 913 F.2d 783 (1990).

Eleventh Circuit's opinion, that he is not responsible for the payment of taxes on income earned postconfirmation on behalf of Theodore B. Gould's individual estate.

If Theodore B. Gould had submitted to the bankruptcy court's order and turned over the sale proceeds of the concrete pumps to the liquidating trustee as part of the estate created by his Section 541(a) property, there would be no controversy and this case would be moot. See Flast v Cohen, 392 U.S. 83, 95 (1968).[19] However, the bankruptcy court's order, entered on March 9, 1989, affirmed by the district court on August 30, 1990,[20] has held that

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19 "...the business of the federal courts [is limited] to questions presented in an adversary context."

20 Holywell Corporation, Theodore B. Gould, et al. v. Fred Stanton Smith, No. 89-1080-Civ-Aronovitz: "The court notes that many of the arguments raised by the appellants in this appeal are actually attempts to relitigate issues that have

[Footnote continued on next page]

the liquidating trustee is not responsible for the payment of taxes on the estate's income earned postconfirmation. The Tenth Circuit, however, has held in In re Joplin, 882 F.2d 1507, 1510 (10th Cir. 1989), that:

> "26 U.S.C. Section 1(e) imposes a tax on the taxable income of -- (1) every estate...taxable under this subsection...,' Id. [Emphasis added],[3] ....26 U.S.C. Section 641(a) provides that the tax imposed by 26 U.S.C. Section 1(d) "shall apply to the taxable income of estates....'[4]"
>
> ---
>
> 3 26 U.S.C. Section 1(e) provides, in part, as follows:
>
> Estates and trusts.--There is hereby imposed on the taxable income of --
> (1) every estate, and
> (2) every trust,
> taxable under this subsection a tax determined in accordance with the following taxable....
>
> 4 26 U.S.C. Section 641(a) provides as follows:

[Footnote continued from previous page] already been decided previously or which are presently on appeal to the Eleventh Circuit, including appellants' arguments concerning the payment of income taxes."

> Imposition of tax
> (a) Application of tax.--The tax imposed by section 1(e) shall apply to the taxable income of estates or of any kind of property held in trust, including--
>
> (1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;
>
> (2) income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;
>
> (3) income received by estates of deceased persons during the period of administration or settlement of the estate; and
>
> (4) income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated. Id.

The historical precedent of the Supreme Court imposes a duty upon any person having possession of the proceeds of the sale of a debtor's property to satisfy any debt due

to the United States

prior to the use of those funds for the payment of claims of any other person.[21]

No court has relieved Theodore B. Gould of the statutory obligation to pay taxes on the income earned from the sale of the property of his individual estate. In fact, the Eleventh Circuit has held that the reorganized debtor "is responsible for such taxes." The positive language of the sections of the Internal Revenue Code, cited in Joplin, preclude Theodore B. Gould's payment of these funds to the liquidating trustee since such payment, with notice that the bankruptcy court's appointed agent is not responsible for satisfying the claims of the United States, could impose civil and criminal penalties on Theodore B. Gould.

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[21] See Lewis, Trustee v. United States, 92 U.S. 618, 622 (1875), citing Thelusson, et al. v. Smith, 2 Wheat. 396, 425 (1817).

For the foregoing reasons, Theodore B. Gould respectfully requests that this Court deny the bankruptcy court's order of contempt.

Respectfully submitted,

Theodore B. Gould, pro se
2568-D Ivy Road
Charlottesville, VA 22901
(804) 295-7125

FORM 4549 (REV 7/81) — DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE — INCOME TAX EXAMINATION CHANGES — Return Form No. 1120

Name and Address of Taxpayers
FRED STANTON SMITH acting on behalf of
HOLYWELL CORPORATION & SUBSIDIARIES
100 NORTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33132-2381

S.S. or E.I.N.: 52-1070235

Filing Status: CORPORATION

Person With Whom Changes Were Discussed:

1. ADJUSTMENTS TO INCOME:	Year: 07/31/86	Year: 07/31/87	Year: 07/31/88	Year: 07/31/89	Year: 07/31/90	Year: 07/31/91
A. TAXABLE INCOME BEFORE NET OPERATING LOSS DEDUCTION	60,786,153.00	471,122.00	817,368.00	967,235.00	2,383,863.00	(1,479,159.00)
B. NET OPERATING LOSS DEDUCTION	(14,270,398.00)		(817,368.00)	(240,849.00)		
C.						
D.						
E.						
2. TOTAL ADJUSTMENTS	46,515,755.00	471,122.00	0.00	726,386.00	2,383,863.00	0.00
3. TAXABLE INCOME PER RETURN	0.00	0.00	0.00	0.00	0.00	0.00
4. CORRECTED TAXABLE INCOME	46,515,755.00	471,122.00	0.00	726,386.00	2,383,863.00	0.00
5. TAX (From Page 2)	21,397,247.00	193,384.00	0.00	246,971.00	810,513.00	0.00
6. ALTERNATIVE TAX, IF APPLICABLE (From Page 10)	18,435,313.00					
7. CORRECTED TAX LIABILITY	18,435,313.00	193,384.00	0.00	246,971.00	810,513.00	0.00
8. LESS: CREDITS:						
A. INVESTMENT TAX CREDIT (Page 2)	987,667.00					
B. JOBS CREDIT (From Page _)						
C.						
9. BALANCE	17,447,646.00	193,384.00	0.00	246,971.00	810,513.00	0.00
10. PLUS:						
A. TAX FROM RECOMPUTING PRIOR YEAR IIC	529,286.00					
B. SELF-EMPLOYMENT TAX						
C. MINIMUM TAX (From Page 11.2)	1,168,006.00					
11. TOTAL CORRECTED TAX LIABILITY	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
12. TOTAL TAX AS PREVIOUSLY ADJ	0.00	0.00	0.00	0.00	0.00	0.00
13. DEFICIENCY (line 11-line 12)	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
14. OVERASSESSMENT (line 12-line 11)						
15. Adjustment to Prepayment Credits						
16. BALANCE DUE, Not including interest	19,144,938.00	193,384.00	0.00	246,971.00	810,513.00	0.00
17. OVERPAYMENT, Not including interest						
18. PENALTIES, IF ANY (see explanation)	5,743,481.00	58,015.00	0.00	12,349.00	162,103.00	0.00

Other Information

Refer to pages 12 through 31 for a comprehensive statement of the facts of this case.
Refer to pages 32 through 41 for a description of the principal issues of this case.

Examiner's Signature Exp. 1226 Date 07/13/92

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

ISSUE NO. 1:

Does the fact that various debtors are "substantively consolidated" in accordance with a plan of liquidation under chapter 11 of Title 11 of the United States Code affect the manner in which they are treated for income tax purposes?

FACTS:

This report is based on the theory that the debtors, (Miami Center Limited Partnership, Holywell Corporation, Miami Center Corporation, Chopin Associates and the Fiduciary Estate of Theodore B. Gould) retain their status as separate entities for tax purposes even though in accordance with the confirmed plan the bankruptcy estates of the debtors were substantively consolidated for administrative purposes under Chapter 11 of the Bankruptcy Code. See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

There are no provisions under the Internal Revenue Code for the consolidation of an individual with a partnership or an individual with a corporation or a partnership with a corporation. These are separate and distinct entities for tax purposes, see section 7701(a) of the Internal Revenue Code.

Section 1399 of the Code provides that except for any case to which section 1398 applies no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code. Section 1398 provides that in a case under chapter 7 or chapter 11 of title 11 of the United States Code in which the debtor is an individual a separate taxable entity is created. There are no provisions in the Code for the consolidation of this separate taxable entity with a partnership or a corporation.

CONCLUSION:

The substantive consolidation did not affect the status as a separate entity for tax purposes of the Estate of the Individual Debtor, Miami Center Limited Partnership, Chopin Associates, Holywell Corporation and Miami Center Corporation.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

ISSUE NO. 2:

Upon the effective date of the Plan of Reorganization, was a separate taxable entity created with respect to the corporate debtors' property which was then responsible for reporting the income on the corporate debtors' property, or was the post-confirmation entity, with respect to the corporate debtors, considered a continuation of such corporate debtors with the Trustee being responsible for reporting the income on the property of such corporate debtors?

FACTS:

See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

Section 6012(b)(3) of the Internal Revenue Code of 1986 provides:

> "In a case where a receiver, trustee in a case under title 11 of the United States Code or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."

The Supreme Court in Holywell Corp. v. Smith, 503 U.S. _____, 112 S. Ct. 1021 (1992) declined to consider whether the trustee qualifies as a receiver or a trustee in a case under title 11 of the U.S. Code, therefore these are still unanswered questions. The Supreme Court did, however, conclude that the trustee is an "assignee" of the corporate debtors under Section 6012(b)(3). The Court further concluded that the trustee must pay the tax due on both the income attributable to the corporate debtors' property and the income attributable to the individual debtor's property. He must pay the tax on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the assignee of the property of the corporate debtors. He must pay the tax on the income attributable to the individual debtor's property because he is the fiduciary of a trust, (the Miami Center Liquidating Trust), in which was vested all the assets of the estate of the individual debtor.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/86-07/31/91

In it's opinion the Supreme Court stated: "The plan, as noted above, transferred the corporate debtor's estates to respondent Smith as trustee for the Miami Center Liquidating Trust." Treas. Reg. Sec. 1.641(b)-2(b) provides that:

> The estate of an infant, incompetent, or other person under a disability, or, in general, of an individual or corporation in receivership or a corporation in bankruptcy is not a taxable entity separate from the person for whom the fiduciary is acting, in that respect differing from the estate of a deceased person or of a trust. See section 6012(b)(2) and (3) for provisions relating to the obligation of the fiduciary with respect to returns of such persons.

In the words of the Supreme Court "As the assignee of "all" or "substantially all" of the property of the corporate debtors, the trustee must file the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee."

The Court in Holywell specifically declined to consider whether the trustee would qualify as a receiver or a trustee in a case under title 11 because the parties did not argue that the tax treatment would differ under either of these characterizations from the "assignee" characterization. The language of section 6012(b)(3) of the Code indicates clearly that the tax treatment is identical regardless of which characterization applies. In Rev. Rul. 79-120, 1979-1 C.B. 382, the Service held that the bankruptcy trustee while acting on behalf of the estate of a bankrupt corporation does not represent a separate taxable entity apart from the corporation and any income or expenses of the trustee should be reported on the income tax return of the corporation. This position was codified in section 1399 which specifically provides that no separate taxable entity results from the commencement of a bankruptcy case involving a corporation. S. Rep. No. 1035, 96th Cong., 1st Sess. 25-26 (1980), 1980-2 C.B. 620, 633.

CONCLUSION:

With respect to the corporate debtors, no separate taxable entity was created by the confirmation of the plan of reorganization. The post-confirmation entity is to be treated as a continuation of each debtor corporation. The Trustee must file returns on behalf of the corporate debtors and include in those returns his income and expenses that apply to the corporate debtors.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/86-07/31/91

ISSUE NO. 3:

How should expenditures made for the payment of Miami Center Limited Partnership debts from the property of Holywell Corporation and the non-debtor subsidiaries be characterized, and are they allowable as deductions in computing the taxable income of Holywell Corporation and the non-debtor subsidiaries?

FACTS:

See pages 12 through 31 for the facts related to this issue.

LAW & ARGUMENT:

During the administration of the Miami Center Liquidating Trust a substantial amount of Miami Center Limited Partnership claims were paid with money obtained from Holywell Corporation and its non-debtor subsidiaries, (see Exhibit No. 16). This was accomplished because the Plan of Reorganization provided for the substantive consolidation of the debtors' estates. The Amended Confirmation Order, entered on January 26, 1986 stated:

> "For example (a) in due course, a creditor of MCLP could reach ...(iii) Holywell's assets (net of its liabilities) by levying upon Gould's ownership of 100% of the stock of Holywell..."

However, the creditors of Miami Center Limited Partnership were paid using Holywell's assets before all its liabilities were paid, such unpaid liabilities being the federal and state taxes.

In the oral argument before the Supreme Court, the Assistant to the Solicitor General, in response to a question by one of the Justices regarding what would be the effect on the general creditors if it was determined that the Trustee was liable for the taxes, made the following statement:

> "My assumption would be that somebody would have to return some money. The trustee has not retained sufficient funds to pay the taxes, so he would have to get it back.
>
> Now, as we know, he sought and obtained an indemnification from one of the major creditors at the time he became a trustee. He looked at the plan, and apparently it was visible to him, although not to anyone else, that there would be a substantial gain and therefore substantial income to be taxed.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/86-07/31/91

> Instead of going to court as he should have, according to this Court's decision in King v. United States, and told the bankruptcy court that there's a big tax obligation here, he went to the creditor who'd proposed the plan and he asked them for and received from them an indemnification if he should ever be held liable for taxes, ... or if I am liable the Bank of New York should pay me because they defrauded me and the estate by proposing a plan that didn't provide for these taxes. ... We anticipate that collection can occur through the moneys the trustee has and through the indemnification that the Bank of New York provided."

If in fact the Holywell and non-debtor subsidiary funds used to satisfy the claims of the MCLP creditors can be recovered then instead of being characterized as corporate distributions they should be characterized as misappropriated funds. Any amounts which are not returned should be characterized as corporate distributions.

Section 63 of the Internal Revenue Code of 1986 defines taxable income as gross income minus the deductions allowed by Chapter 1 (other than the standard deduction). Part VI of Subchapter B of Chapter 1 of the Code contains the sections that provide for itemized deductions for corporations. These deductions include trade or business expenses, interest, taxes, losses, bad debts, depreciation etc. Part VIII of Subchapter B of Chapter 1 contains sections that provide for special deductions for corporations. These deductions include various dividends received deductions and organizational expenditures. There is no provision in any section of Chapter 1 of the Code that allows a deduction for amounts used to satisfy the debts of another taxpayer.

There are specific provisions in the Code that disallow deductions for corporate distributions. Section 311 of the Code provides that no loss shall be recognized by a corporation on a distribution with respect to its stock. Section 361(c) of the Code provides that no loss shall be recognized by a corporation a party to a reorganization on the distribution to its shareholders of property in pursuance of the plan of reorganization.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/86-07/31/91

CONCLUSION:

To the extent the expenditures made from the property of Holywell Corporation and the non-debtor subsidiaries used to satisfy the debts of MCLP can be recovered they should be characterized as misappropriated funds. To the extent such funds are not recovered they should be characterized as corporate distributions. In either event the expenditure of such funds does not give rise to a deduction from gross income for Holywell Corporation or its non-debtor subsidiaries.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

ISSUE NO. 4:

Should the penalties for negligence and failure to file under sections 6653(a) 6662 and 6651(a)(1) of the Internal Revenue Code be assessed in this situation?

FACTS:

See pages 12 through 31 for the facts relating to this issue.

LAW & ARGUMENT:

For all income tax returns the due date for which is before January 1, 1990 section 6653(a) of the Internal Revenue Code imposes a penalty for negligence or intentional disregard of rules and regulations. Public Law 99-514 section 1503(a) amended Code Sec. 6653 by deleting the word "intentional" and adding paragraph (a)(3) which defines "negligence" to include any failure to make a reasonable attempt to comply with the provisions of this title, and "disregard" to include any careless, reckless, or intentional disregard. The penalty is 5 percent of the underpayment plus, (for returns due after December 31, 1981 and before January 1, 1989) 50 percent of the interest on the underpayment attributable to negligence. For a delinquent return the underpayment is equal to the total amount of the tax imposed by Subtitle A.

For all income tax returns the due date for which is after December 31, 1989 section 6662 of the Internal Revenue Code imposes a penalty for negligence or disregard of rules or regulations. Subsection (c) defines "negligence" and "disregard" just as paragraph (a)(3) of section 6653 did. The penalty is 20 percent of the portion of the underpayment to which the negligence applies.

In the case at issue the evidence strongly indicates that the Plan of Reorganization was calculated to avoid the payment of income tax. The debtors alleged fraud on the part of the Bank of New York but the courts refused to consider this issue. Despite the fact that the law is clear, (which is shown by the Supreme Courts unanimous decision) the Trustee refused to file returns and pay the tax.

..

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

The following factors are evidence that the Plan was calculated to avoid the payment of income tax:

a) The fact that the Plan ignored the liability for the payment of income taxes.

b) The provision for the substantive consolidation of the Debtors' estates. The substantive consolidation merged the estates of the 5 debtors into a single estate creating a common pool of assets from which the claims were paid. This commingling of assets made it very difficult to prepare a return for the corporate debtor. There was no separate accounting for the corporate debtor's assets, liabilities, income or expenses by the Trustee. In fact the assets of a non-debtor subsidiary, (Twin Development Corporation) were also commingled with the debtors' assets.

c) One of the provisions of the Plan was the elimination of the claims of Holywell Telecommunications Company and Holywell Leasing Company. As of October 10, 1985 the total amount of rents due these two non-debtor subsidiaries of Holywell from Miami Center Limited Partnership was $3,315,672 plus interest. This was moneys that could of been used to help satisfy Holywell's tax liability.

d) The inclusion of the proceeds from the sale of the Washington Properties that included approximately $13,000,000.00 that belonged to Twin Development Corporation in the "Trust Property". Twin Development was a non-debtor subsidiary of Holywell and was severally liable for the taxes of the consolidated group.

e) The inclusion of the proceeds from the sale of the Washington Properties that included approximately $13,000,000.00 that belonged to Holywell Corporation in the "Trust Property". Holywell was a limited partner and guaranteed part of the loan from the Bank of New York that was satisfied by the sale. Holywell was not liable for the other claims.

f) The conveyance of the property of Holywell Telecommunications Company and Holywell Leasing Company to the designee of the Bank of New York without consideration. This further deprived the consolidated group of assets that could have been used to satisfy its tax liability. It also appears to be an attempt to create a taxable loss for the value of the property.

g) The fact that the Trustee waited over two years, at which time the plan was substantially consummated, before he brought an action in the bankruptcy court to determine the extent of his liability for the taxes of the debtors. That instead of going to court immediately the Trustee went to the Bank of New York, asked for, and received from them an indemnification.

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for the failure to file a tax return on the date prescribed therefore unless such failure is do to reasonable cause and not willful neglect. The amount of the penalty is equal to 5 percent of the amount of tax required to be shown on such return for each month such failure continues to a maximum of 25 percent.

The court in In the Matter of I. J. Knight Realty Corp., 77-2 USTC par. 9536 stated:

> "A long line of cases holds that advice of reputable counsel that a taxpayer is not liable for certain tax or not required to file a return establishes that failure to file within the prescribed time is due to reasonable cause and not wilful neglect."

The first return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1985 which included the gains from the sale of the Washington Properties. The Trustee refused to file this return which was due on October 15, 1985. The next return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1986 which included the gain from the sale of the Miami Center. The Trustee refused to file this return which was due on October 15, 1986. The next return for which the Trustee was liable to file was the return for Holywell's fiscal year ending July 31, 1987. The Trustee refused to file this return which was due on October 12, 1987.

Instead of going to the court immediately upon his appointment to determine his responsibility for the federal taxes of the debtors he went to the Bank of New York, asked for, and received from them an indemnification against personal liability. The Trustee did not commence the proceeding in the bankruptcy court seeking a declaration that he was not required to file federal income tax returns until December 28, 1987. By this time the plan was substantially consummated and the funds remaining were not adequate to satisfy the tax liabilities. A ruling against the Trustee would mean that the plan was inadequate and in fact should not of been confirmed in the first place. The bankruptcy court ruled in favor of the Trustee on April 28, 1988, however the decision was clearly erroneous as is shown by the Supreme Court's unanimous decision. The evidence indicates that there was never any intent on the part of the Trustee to file any returns, that the Plan ignored this responsibility and in fact was designed to avoid the payment of income tax.

The Trustee may not assert the "reasonable cause" defense against the failure to file penalty for returns due before December 28, 1987 for the reasons stated above. For returns due after December 28, 1987 the Trustee may assert the

FORM 886-A (Rev.May 1980)	Department of the Treasury Internal Revenue Service EXPLANATION OF ITEMS	Schedule No.or Exhibit
Name of Taxpayer FRED STANTON SMITH acting on behalf of HOLYWELL CORPORATION & SUBSIDIARIES		Year/Period Ended 07/31/85-07/31/91

"reasonable cause" defense since the question was then in the hands of the courts.

CONCLUSION:

The penalties for negligence and failure to file under sections 6653(a) and 6651(a)(1) of the Internal Revenue Code are applicable and should be assessed for the years ending July 31, 1985; July 31, 1986 and July 31, 1987. In addition the penalty for negligence under section 6653(a) is applicable and should be assessed for the years ending July 31, 1988 and July 31, 1989. The penalty for negligence under section 6662 is applicable and should be assessed for the years ending July 31, 1990 and July 31, 1991. However, note that no penalties will be assessed for years in which there is no deficiency.